IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 21ST JUNE 2007 / 31ST JYAISHTA 1929

CRP.No. 553 of 2007()

AGAINST CMA 25/04 OF SUB COURT, OTTAPPALAM AND I.A.1108/04 & I.A.1109/04 IN OS.307/2000 of MUNSIFF COURT, OTTAPALAM.
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REVN. PETITIONER: APPELLANT/PETITIONER/3RD DEFENDANT:

GOPALAKRISHNAN,
S/O. ERANDATH PUTHAN VEETTIL LAKSHMIKUTTY AMMA,
OTTAPALAM AMSOM, ARIYOOR THEKKUMURI DESOM,
OTTAPALAM.

BY ADV. SRI.SANTHEEP ANKARATH

RESPONDENTS: RESPONDENT/RESPONDENT/PLAINTIFF:

REENA ASHOK,
D/O. ERANDATH PUTHAN VEETTIL RUGMINI AMMA,
ARIYOOR THEKKUMURI DESOM IN OTTAPALAM TALUK,
REPRESENTED BY POWER OF ATTORNEY HOLDER,
E.P. RUGMINI AMMA, "SREE VEEDU", MUKKATTA,
NILAMBUR AMSOM AND DESOM, NILAMBUR TALUK.

BY ADV. SRI.G.SREEKUMAR (CHELUR) CAVEATOR

THIS CIVIL REVISION PETITION HAVING COME UP FOR ADMISSION ON 21/06/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A. 1423 OF 2007
IN
C.R.P. NO.553 OF 2007

DISMISSED

21/6/07 **SD/- M.N. KRISHNAN, JUDGE.**

[True Copy]

P.A. TO JUDGE.

M.N. KRISHNAN, J.

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C.R.P. NO. 553 OF 2007

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Dated this the 21st day of June, 2007.

O R D E R

This revision petition is preferred against the order of the Subordinate Judge's Court, Ottappalam in dismissing the application for condonation of delay of 119 days and as a consequence CMA 25/04 also. The revision petitioner is the 3rd defendant. The suit was filed against the mother and two sons and at the first instance notice was served on the 2nd defendant on behalf of the 3rd defendant and therefore he was set exparte. Defendants 1 and 2 entered appearance but did not prosecute the matter and therefore the suit ended in a decree. Thereafter, they filed an application without the juncture of 3rd defendant to set aside the exparte decree which was allowed by the Court. Thereafter again when the matter came up they remained absent and the suit happened to be decreed as exparte. Thereafter, 3rd defendant now comes to the scene with an application to set

aside the exparte decree which was dismissed by the trial court. With a delay of 119 days in filing the C.M.A., a Civil Miscellaneous appeal was filed challenging the order passed by the learned Munsiff under Order IX Rule 13 of C.P.C. The main contention of the revision petitioner is that he was not served with notice at the original stage and he came to know about the proceedings only when he received notice in the execution petition and therefore the decree must be set aside.

2. This is a classical case where defendants have joined hands together one after the other to see that the relief granted to the plaintiff is never implemented. The 3d defendant admittedly has no case that he is permanently residing in another place. The very address given in the revision petition as well as in the other applications would reveal that defendants 1, 2 and 3 are residing in the very same address. Under Order V Rule 15 of the C.P.C. when the process server finds that temporarily the person to be served is out of place and three is reasonable likelihood of coming in a short span of time the law permits service of summons on an adult member residing with the said person. From the

defendant's address made available before this Court even by the civil revision petition it can be seen that the permanent boarding of the 3rd defendant is along with defendants 1 and 2. So, his attempt to project that he is a person who is staying out cannot be believed at all.

3. Secondly, according to him, is a film representative touring around and therefore he was not available. Except the mere averments in the petition there is no other evidence tendered to show that he is a film representative and that he has been moving around on account of the job, was unable to be in the premises at that time. The present revision petitioner even did not mount the box to give any evidence in support of his contentions. Mere averments are not sufficient and pleadings cannot be a substitute for proof. It is very clear now that defendants 1 and 2 who had been twice set exparte are keeping silent and the 3rd defendant comes before the Court projecting that he is a victim of non-service of notice and wants an opportunity. I feel there is absolutely no truth in the said statements. This is a classical case where parties are guilty of gross negligence and grave mis-conduct and therefore he does not

require any indulgence or sympathy from the Court. By using the discretion indiscriminately one cannot put the winning party into the position of a loosing party. Therefore, I am absolutely satisfied that there exists no ground to condone the delay as well as setting aside the exparte order in this matter. So, the revision lacks merit and it is dismissed.

M.N. KRISHNAN, JUDGE.

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